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Old Macdonald (Inc.) Has a Farm... Maybe or Nebraska's Corporate Farm Ban: Is It Constitutional

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The structure of mid-American's rural "way of life" is commonly thought to be predicated upon the family farm as a basic social and economic unit. In recent years, however, two trends have developed relative to farm ownership and operation which will radically alter this traditional structure. These trends include the substitution of family farm corporations for individual farmer/operators and the aggregation of farm ownership and operation into larger corporate conglomerates.

This latter trend has generated substantial opposition in agricultural states. By the early 1960s, one noted agriculture-economist was speculating that the incursion of large-scale non-family corporations into farming would ultimately stimulate state protective legislation. Indeed, although the incorporation of the family farm has been recognized as being beneficial, even necessary, non-family

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1. Typical of comments is the following statement by a midwestern U.S. Senator: It is in the interest of the country that the family farm be preserved. The vitality of this nation is integrally bound up with the health of rural America, and, specifically, with the economic health of the population that comprises rural America. For this reason, I am especially disturbed by those who assert the inevitable demise of the backbone of rural America: the family farm. This is also the reason, in an effort to reverse or at least significantly abate our headlong descent into a state of corporate feudalism, that I helped author a bill . . . [which] provides 'for the continued existence of the family farm, by protecting family farms against the monopolization of the agricultural industry.'


2. See infra note 29.


corporate farming has been criticized and subsequently regulated. Due especially to the interstate nature of contemporary agriculture, however, questions exist as to the constitutionality of state participation in this regulatory arena. This is particularly true when regulation achieves the level of prohibition.

Prohibiting non-family corporate farming is precisely what the State of Nebraska recently did. In 1982 Nebraska voters approved a state constitutional amendment, the object of which was “to prohibit non-family farm corporations from further purchase of Nebraska farm and ranch land, and to prohibit further establishment of non-family corporate crop and livestock operations.” This article will examine that Nebraska constitutional amendment. It will explore the trends toward corporate farming and examine the Nebraska legislation in light of federal constitutional standards.

I. THE TREND TOWARD CORPORATE FARMING

A. The Family Farm Corporation

The changing commercial nature of the farming industry has created a situation which frequently makes incorporation of the family farm seem desirable. Technologically complex and possibly

5. See generally Comment, Proposed Anticorporate Farming Legislation, 1972 Wis. L. REV. 1189 (1972) [hereinafter cited as Wisconsin Comment].


7. NEB. CONST. art. III, § 2, states:

The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature.

A petition seeking approval of a constitutional amendment must be signed by ten-percent of the state’s electors, including five-percent of the electors of each of two-fifths of the counties of the state. The total number of electors is set as the whole number of votes cast for governor at the general election next preceding the election at which the initiative is submitted for a vote. NEB. CONST. art. III, § 4.

In 1982, Initiative 300 was entitled “Initiative Petition to Preserve the Family Farm.” It was approved by Nebraska voters on November 2, 1982, winning 56.6-percent of the vote.

8. Initiative 300, supra note 7.
dangerous machinery creates the need for limiting potential personal tort liability. The use of substantial debt financing creates the need for limiting potential contract liability. The rise of intergenerational capital accumulation creates the need for limiting destructive estate tax liabilities. The corporate form of operation meets all of these needs while also providing income tax benefits.

This change in the farm's commercial structure provides these benefits to the former owner/operator while avoiding the creation of any economic or social "threat." The farm as a business enterprise is characterized by retention of corporate control within a family with family members becoming shareholders and employees. No absentee ownership or control results. The family farm is run for a profit, generally with limited nonfarm investments. Overall,

[the farmer . . . who incorporates his business is still the same independent, community-minded citizen that he was as a sole proprietor or partner. Few of the objections voiced against the farm conglomerate are applicable to the family farm corporation. . . . Far from threatening rural life, the family farm corporation may well increase the viability of the family owned and operated farm.]

Recent reports filed in several Midwestern state capitals document that a trend toward family farm incorporation has become firmly established in the 1970s. By 1977, 2,923 corporations reported farming in Iowa, an increase from the 621 counted in the 1969 Census of Agriculture. Nebraska, during that same period, experienced an increase from 659 corporations reported in the 1969 Census to 2,209 in 1977. In Kansas, the increase was from 328 to...
Most of these corporations were family farms which had
been converted to corporate form.\footnote{Id.}

B. The Conglomerate Farm Corporation

A recent movement toward increasing nonfarm investment in
agriculture has resulted in the growth of the farm conglomerate.
Strident opposition to this trend has developed,\footnote{See, e.g., The Effects of Corporate Farming on Small Business: Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business, 90th Cong., 2d Sess. (1968) [hereinafter cited as Hearings]; cf. The Ag-Land Trust Proposal: Hearings Before the Subcomm. on Family Farms, Rural Development, and Special Studies, of the House Agriculture Comm., 95th Cong., 1st Sess. (1977) [hereinafter cited as Ag-Land Hearings].} with one U.S. Sen-
ator terming it a "descent into corporate feudalism."\footnote{Abourezk, supra note 1, at 499.} Those farm
corporations which appear to be objectionable are characterized as
being large-scale firms using conglomerate organization; having ab-
sentee ownership or control; representing significant nonfarm in-
vestment; establishing vertical integration; and relying on hired
managers and laborers.\footnote{Wisconsin Comment, supra note 5, at 499. Although not every "corporate farm"
need have all of these characteristics,
[it] is possible to envision the type of corporate farm . . . sought to [be] prohib-
ite[d]. Such a farm corporation is owned or controlled by nonfarmers who supply
the financial backing but do not participate in either farm management or labor.
The farming operations of the corporation may be only a part of a widely diverse
pattern of investment in other nonagricultural areas. Tax advantages rather than
profit may be its primary goal. South Dakota Comment, supra note 4, at 580.}
The proliferation of such corporate farms
in the agricultural industry is perceived to threaten the ability of
young farmers to enter the industry, the ability of rural communities
to maintain a high level of social and economic existence, and the
ability of young farmers to adequately compete in the marketplace.

The increasing presence of large nonfarm corporations in the
land market would result in substantial increases in agricultural
land prices. One major impact of such price escalation is that young
farmers will find it more difficult to get started in farming or to ex-
pand their present farm unit to an adequate size. The primary cause
for this cost inflation is the ability and willingness of farm conglom-
erates to "pay more than the going price to get what they want."\footnote{Hearings, supra note 17, at 25.}
The very presence of additional bidders competing for a parcel of
land is another factor in increasing land prices.\footnote{Ag-Land Hearings, supra note 17, at 252-53 (statement of J. Dawson Ahalt, Staff
Economist, Economic Research Service, U.S. Department of Agriculture).}
markets being extremely segmented, the extensive capital which would be made available by a conglomerate in a few markets would have significant impacts in each locality.22

The depopulation which would follow the resulting transfer of ownership23 and income24 from the rural areas to the metropolitan areas has a further direct adverse impact on rural towns.

Economic advantages attributable to conglomerate corporate farming include the ability to vertically integrate the agriculture industry25 and the ability to buy machinery and supplies in bulk.26 Corporations thus claim an economic efficiency by avoiding the payment of “full retail prices” in the first instance by purchasing inputs from its own subsidiaries and in the second instance by purchasing at the wholesale level.27 In each instance, however, the impact is to bypass local merchants “such . . . as implement dealers, hardware stores, lumberyards, and feedstores [which] must have a good number of prosperous farmer-customers to stay in business.”28 As farm sizes increase and the number of farm families de-

22. Id. Ahalt said:

The Ag-Land Fund appears insignificant when compared to the $12.2 billion spent on farm real estate transfers nationally during the year ending March 1, 1976. However, for this issue, it is improper to consider the market for farmland on a national scale. Farms are bought and sold in very small localized markets with a few bidders for each property sold. Only a small percentage of the land in any community, perhaps 3 to 5 percent, transfers in any 1 year. . . . [If 10 percent of the private pension funds, which totaled $215.9 billion in 1975, were invested in farm real estate markets within a 2-year period, the amount of money in the market would be increased by about 78 percent in each year. Such an increase could dramatically inflate market prices.

23. A distinction needs to be drawn between corporate ownership and corporate operation. For a more thorough discussion, see infra text accompanying notes 42 to 53.

24. This point was made quite strongly by Professor Richard D. Rodefeld in his testimony before Congress in 1973. He said:

It is very clear that you are going to have a large proportion of the total profits generated by farm operations leaving the local communities if the farms have absentee owners. Obviously, a higher proportion of the profit will go to where the owner is located. If these owners are located in large metropolitan centers, this is income and revenue that is lost to the local community from which it emanated. The Role of Giant Corporations in the American and World Economies: Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business, 92d Cong., 1st & 2d Sess., pt. 3, at 4003 (1973) [hereinafter cited as Rodefeld].


26. Wisconsin Comment, supra note 5, at 1193-94.

27. Montana Comment, supra note 25, at 90.

crease,29 rural towns will feel the further economic pinch due to the "direct effect on such businesses as grocery stores, drugstores, newspapers and filling stations."30 The widespread incursion of conglomerate corporate farming will also cause a decline in the social well-being of surrounding small towns.31

Finally, the continued expansion of corporate farming is expected to adversely affect farm competition as nonfarm corporations begin agricultural production in order to set-off farm expenses against other nonfarm income.32 Those losses can later be recouped by capital gains which are taxed at a substantially lower rate than income.33 As a result, family farmers are placed in the position of competing against nonfarm corporations which "regularly take farm losses as deliberate financial policy."34

In light of these perceived problems with the unchecked expansion of corporate farms,35 several states have enacted legislation to further the goal of "family farm preservation."36 Such legislation generally places restrictions on corporate farm ownership and is aimed at the "pure investors who have no investment purpose other than security, appreciation of capital and a current return."37

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29. Nationally, the average farm size increased from 175 to 390 acres between 1940 and 1972. Between 1940 and 1970, the number of workers on family farms decreased by 60%, the number of hired farm workers decreased by 57%, and the number of farms themselves decreased by 55%. Abourezk, supra note 1, at 500.

In South Dakota the size of the average farm increased from 781 acres in 1960 to 1,046 acres in 1974. The total number of farms in that state during the same time period decreased nearly 26%. South Dakota Comment, supra note 4, at 576-77.

30. See supra note 28.

31. Rodefeld, supra note 24, at 4003; cf. Senate Special Comm. to Study the Problems of American Small Business, Small Business and the Community, 79th Cong., 2d Sess. (1946). That study compared the communities of Arvin and Dinuba, California. Arvin was surrounded by small family farms while Dinuba was surrounded by large corporate farms. The small farm community surpassed Dinuba in such areas as volume of retail trade, city improvements, social recreation, churches and educational facilities.


34. Hearings, supra note 17, at 25.

35. The North Dakota corporate farming statute is the sole exception. Enacted in 1932, the purpose of the statute was to force corporations which had foreclosed on mortgages to resell land to individual farmers at the current depressed prices. See N.D. Cent. Code §§ 10-06-01-06 (1976), but see supra note 6; cf. South Dakota Comment, supra note 4, at 580-81.

36. See Harl, supra note 6, at 51.04.

II. THE NEBRASKA REGULATORY RESPONSE

Nebraska's constitutional proscription of non-family corporate farming is the out-growth of a long and bitter legislative and political battle. The state constitutional amendment places restrictions both on the operation of farms and on the ownership of agricultural lands. The proscription was designed to prevent further incursion of non-family farm corporations into crop and livestock operations. The Nebraska amendment can be divided into two basic parts for analysis: 1) the specific prohibitions on operation and ownership; and 2) the specified exemptions granted both by business-type and by activity-type.

A. The Proscriptions

1. Operations: In the State of Nebraska, corporations are absolutely prohibited from "engag[ing] in farming or ranching." The constitutional amendment defines farming and ranching to include the "cultivation of land" for specified agricultural purposes or the "ownership, keeping or feeding of animals for the production of livestock or livestock products . . . ." This prohibition on the actual business of farming appears to be aimed at preserving the present commercial structure of the agricultural industry.

The corporate farming amendment will tend to disrupt the vertical integration of agriculture. Such a commercial structure occurs when a single corporation controls an industry from the inputs to the production and distribution system. In agriculture,

[c]attle are raised on the corporation's ranchland, fattened in the corporation's feedlot on grain from the corporation's cropland, slaughtered and processed in the corporation's packinghouse and finally sold in the corporation's supermarket. One giant con-

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38. See Nebraska Bans Non-Family Corporate Farms, SMALL FARM ADVOC. Vol. IV, No. 2, at 1, 8-9 (Fall 1982).
39. Id.
40. Id.
41. This analytical method of reviewing the statute is taken from Morrison, supra note 37, at 964-65.
42. NEB. CONST. art. XII, § 8(1).
43. These purposes include the "production of agricultural crops, fruit, or other horticultural products . . . ." Id.
44. Id.
45. For purposes of this article, "farming" will include both "farming" and "ranching."
glomerate operating from feedlot to supermarket can easily duplicate the efforts of thousands of family ranch and farm units.\textsuperscript{47} The presence of a vertical commercial structure in the agricultural industry, it is argued, unduly restricts competition with a resulting adverse impact on consumers.\textsuperscript{48} Nebraska's prohibition on corporations engaging in the actual business of farming seeks to prevent this result by leaving control of agricultural inputs in the hands of a multitude of family farmers and farm corporations.

2. \textit{Ownership:} Ownership restrictions in Nebraska are directed toward preventing the expansion of agricultural land holdings by corporations.\textsuperscript{49} "No corporation," the amendment states, "shall acquire, or otherwise obtain an interest, . . . in any title to real estate used for farming or ranching in this state . . . ."\textsuperscript{50} Actual divestiture of land, however, is mandated only in those instances in which the land was acquired in violation of the constitutional proscriptions or in which a corporation ceases to meet the criteria defining it as a "family farm corporation."\textsuperscript{51} Note also that only "real estate used for farming or ranching" is affected by the constitutional amendment. Application of the amendment is thus constrained by the land's actual present use.\textsuperscript{52} Even if suitable for farming, land not now used for such purposes does not fall within the terms of the amendment.\textsuperscript{53}

\textsuperscript{47} South Dakota Comment, supra note 4, at 580: "An illustration of such practices is Tenneco Inc., 'a huge conglomerate with 3.4 billion dollars in assets, that has told its stockholders that it is developing a food system based on integration from seedling to supermarket.'" \textit{Id.} at 580-81.

\textsuperscript{48} See generally Wisconsin Comment, supra note 5, at 1193-98.

\textsuperscript{49} Thus, land held by corporations at the time of enactment is not subject to the prohibition. NEB. CONST. art. XII, § 8(1)(D). This grandfather clause has constitutional implications. \textit{See infra} text accompanying notes 167-68.

\textsuperscript{50} NEB. CONST. art. XII, § 8(1).

\textsuperscript{51} For an outline of the criteria for a family farming corporation, \textit{see infra} text accompanying notes 57-62.

\textsuperscript{52} This language can be meaningfully contrasted to the Iowa statute. IOWA CODE ANN. §§ 172C.1 to 172C.15 (1982 Supp.).

\textsuperscript{53} NEB. CONST. art. XII, § 8(1)(j). Note, however, that for purposes of the grandfather clause, the amendment did not employ the "used for farming" language. Rather, the exemption applies to all "agricultural land . . . being farmed or ranched, or which is owned or leased . . . by a corporation. . . ." (emphasis added) \textit{Id.} at § 8(1)(D). The grandfather clause is thus much broader than it should have been. Land which is owned by a corporation, even if not actually farmed at the time the constitutional amendment was adopted, can subsequently be farmed by that corporation despite the constitutional proscriptions.
B. The Exemptions

Corporate farm legislation is "intended to apply only to farms producing those crops or products which have been the traditional core of agricultural production on family farms in the Midwest area. . . ." The purpose of such legislation is to retain the family farm as the primary producer of food and fiber in the United States. Thus, "where the [corporate farm] prohibition is more broadly drawn, exceptions reduce the effect back to this common denominator." That is the case in Nebraska as well.

1. By business type: Not all corporations are prohibited from acquiring agricultural land in the State of Nebraska. The "family farm corporation" is included as the major exception from the general prohibition. The definition of a "family farm corporation" is based upon the major factors of corporate purpose and corporate ownership. A family farm corporation must be "engaged in farming or ranching or the ownership of agricultural land," and all of the shareholders of the family farm corporation must be natural persons. A majority of the voting stock must be held by persons who are related to one another within the fourth degree of kindred, and at least one of the family members must reside on the farm or be actively engaged in its "day-to-day labor and management." It is important to note that the required nexus between the family and the actual operation of the farm is phrased in the conjunctive. An active day-to-day family involvement simply in the "management"

54. Morrison, supra note 37, at 967.
55. One agricultural commentary states:
The continuing decline in the number of farms nationally and the rising number of corporations, absentee and foreign interests involved in agriculture has alarmed farm organizations and farm communities.” Farmers in the Great Plains and Midwest have been particularly worried about this problem. These farmers fear that the California agricultural economy—in which corporations grow, process, transport and market most farm produce—will sweep relentlessly eastward.

56. Morrison, supra note 37, at 967.
57. NEB. CONST. art. XII, § 8(1)(A).
58. Id.
59. Id. Two exceptions exist, however. “[A] trust created for the benefit of a member” of the farm family can hold the majority of stock; no corporation can hold any stock in a “family farm corporation” unless all of the stockholders of such a corporation are related within the fourth degree of kindred to the majority of stockholders in the family farm corporation. Even then, such a corporation could not hold a majority stock ownership in the family farm corporation.
60. Id.
61. Id.
of the farm is insufficient to qualify it as a family farm corporation. The amendment also eliminates the logical loophole for businesses to utilize to avoid corporate ownership restrictions. Corporations are prohibited from forming subsidiaries, facially owned and controlled by a "farm family", for the sole purpose of farming and farm ownership. It seems clear that corporations owning farmland are intended to be small, closely-held corporations with farming as their principal business.62

2. By activity type: Corporations otherwise prohibited from acquiring or obtaining agricultural land in Nebraska are exempted from this proscription if engaged in specified activities.63 Such activities are readily justifiable when compared to the purpose of the amendment, to protect the family farm.64 First, the ability of corporations in the financial sector to take interests in land either as security for an encumbrance65 or in satisfaction of an encumbrance66 is protected. The reasoning behind this exemption is apparently that such acquisitions do not manifest a corporate desire to become actively engaged in the business of farming.67 Indeed, it would be difficult, if not impossible, to obtain necessary debt financing without the security of the land to serve as the foundation of the financial transaction.68

Second, protection is established for farms operated for "research or experimental purposes"69 if the commercial sales from land used for those purposes are "incidental to the research or ex-

62. Thus, the exemptions for nonprofit corporations in § 8(1)(B) would seem unwise. The nonprofit nature of the corporation would not change the character of the harm to be prevented. Indeed, in some states nonprofits are losing exemptions. See Morrison, supra note 37, at 970-71.

63. These purposes include raising poultry, Neb. Const. art. XII, § 8(1)(F); leases for the production of alfalfa, Id. at § 8(1)(G); and custom spraying, fertilizing or harvesting. Id. at § 8(1)(M).

64. See supra text accompanying notes 54-56. The exemptions for alfalfa leases and for poultry seem to run counter to this purpose. Still, the decisions as to what to include or to exclude from the legislation are not subject to substantive judicial review. See infra note 140.


67. The history of the North Dakota corporate farm statute is contrary to this observation. In North Dakota the widespread Depression foreclosures prompted the ban on corporate farming. See McElroy, North Dakota's Anti-Corporate Farming Act, 36 N.D.L. Rev. 96 (1960).

68. See supra text accompanying note 10.

perimental objectives of the corporation or syndicate.”

Third, exemptions are established for agricultural land acquired for “nonfarming purposes.” In this respect, family farms do not receive protection from ongoing physical encroachment. Productive cropland may still be converted into parking lots, factories and split-level ranchhouses. The land must be “necessary” for the nonfarming business and can be acquired for either “immediate or potential use.” While “potential” is undefined, land held under this exemption may not be held for more than five years and, if used for farming during that time, must be leased either to an unincorporated farmer or to a family farm corporation.

A final clause protects previously held land so long as there is continuous ownership by the same corporation. To fall within the terms of this grandfather clause, the land must have been used for farming on the effective date of the amendment. The corporation must also have either owned or leased the land or held a legal or beneficial interest in the land on that date as well.

Having surveyed the regulatory provisions of the Nebraska corporate prohibition, it is then necessary to examine the federal constitutional constraints, if any, within which the legislation must operate.

III. THE CONSTITUTIONAL QUESTIONS

Business corporations have traditionally been subject to extensive state regulations. Corporate ownership of land is included

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70. Id. There exists, however, no definition of what constitutes an “incidental” sale. The Nebraska language can be constructively compared to the Iowa statute, which states: “Commercial sales are incidental to the research or experimental objectives of the corporation when they are less than twenty-five percent of the gross sales of the primary product of the research.” Iowa Code Ann. § 172.C.4(2) (1982 Supp.).

71. Neb. Const. art. XII, § 8(1)(J). Acquisition of the “mineral rights on agricultural land” are separately protected. Neb. Const. art. XII, § 8(1)(I). One must wonder whether the five year limitation in § 8(1)(J) applies to that exemption as well.


74. Id.

75. Neb. Const. art. XII, § 8(1)(D).

76. Id.

77. Id. “For purposes of this exemption,” the amendment reads, “a contract signed as of the effective date of this amendment shall be considered as owned. . . .” Id.

78. See generally Neb. Rev. Stat. § 21-2001—21-20,147 (1977). Two different ways of controlling corporate actions should be distinguished. First, the state could work through its corporation laws, restricting the legitimate purposes and powers of corporations organized
within the purview of that regulatory control. In some instances, companies are banned from holding land for particular purposes, while in other instances, ownership is approved except for particular purposes. Historically, a corporation was limited to holding only those lands which were necessary and proper for its legitimate business. While the actual exercise of this state power over corporations has steadily declined in recent years, no dispute has arisen over the conceptual and legal basis underlying the power's exercise.

Extensive state control over corporations, however, is not coterminous with unbridled state regulation. In 1963, for example, the Iowa Supreme Court clearly set limits on that state's power when it held: While corporations are creatures of the state, subject to control by the state, that control is not absolute and is subject to limitations found elsewhere in both the federal and state constitutions. Three approaches which may be used in seeking to challenge corporate farm legislation on federal constitutional grounds involve the due process, equal protection and commerce clauses of the constitution. Irrational regulations, unreasonable classifications and

under that state's laws. Second, the state could enact legislation simply as a general measure in furtherance of its general police powers. Nebraska follows the latter approach.
excessive burdens on commerce would form the respective basis of each of these constitutional claims.

A. The Due Process And Equal Protection Questions

The U.S. Supreme Court, in *Asbury Hospital v. Cass Co.*, 89 directly rejected due process and equal protection challenges to a state prohibition on corporate ownership of farmland. In *Asbury Hospital* the Supreme Court considered the 1932 North Dakota corporate farming statute which said that corporations holding land “used or usable for farming or agriculture”90 at the time of the enactment must divest such lands within ten years, except for those lands “reasonably necessary in the conduct of their business.”91 Corporations, further, were banned from the business of farming,92 and land held in violation of that statute was made subject to escheat.93 Plaintiff corporation, Asbury Hospital, challenged North Dakota’s statute as violating the due process clause. The corporation alleged that the state could not statutorily force a sale of land innocently acquired when the corporation could not recapture its original investment.94 The Supreme Court rejected that argument, observing that a state has an “unqualified power . . . to exclude a foreign corporation from doing business or acquiring or holding property within it.”95 The Supreme Court held:

The total exclusion of a corporation owning fixed property within a state requires it to sell or otherwise dispose of such property. . . . While applicant is not compelled by the present statute to cease all activities in North Dakota, the greater power includes the less.96

In denying Asbury Hospital’s due process claim, the Supreme Court continued to shun substantive due process challenges to state economic regulatory legislation.

The Court first signaled the death of substantive due process claims in *Nebbia v. New York.*97 In *Nebbia* the Court was faced with

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89. 326 U.S. 207 (1945).
90. *Id.* at 209.
91. *Id.*
92. *Id.* at 214.
93. *Id.* at 209.
94. *Id.* at 211-12. Plaintiff corporation argued, in *Asbury*, that its land should receive greater protection because it was innocently acquired. By this, the corporation meant that the land was lawfully acquired free of any restrictions. *Id.* at 211.
95. *Id.* at 211 (citations omitted).
96. *Id.* at 212.
a challenge to legislated milk price supports. The New York legislature had established a Milk Control Board with power, among other things, to fix minimum and maximum retail prices. The Board set milk prices at nine cents a quart, a price which Nebbia undersold. The Supreme Court noted that the controls were imposed in 1932, when prices were “much below the cost of production.”98 The decline in milk prices, the Court said, substantially exceeded the decline in prices generally. “The situation of the families of dairy producers had become desperate . . . .”99

Plaintiff argued that the enforcement of the milk price controls denied him due process of law.100 He argued that the use of property and the making of contracts were matters of private, not public, concern.101 “Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business,” Nebbia said, “direct fixation of prices is a type of regulation absolutely forbidden.”102

The Supreme Court rejected Nebbia’s argument and articulated the breadth of state legislative powers over economic matters.

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy reasonably may be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.103

The Court concluded:

Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.104

The Nebbia philosophy, that states have wide latitude to regulate their own economic affairs, has been reflected in a series of U.S. Supreme Court decisions regarding business regulation comparable to Nebraska’s corporate farm ban. In Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.,105 the Supreme Court consid-

98. Id. at 515.
99. Id.
100. Id. at 521.
101. Id. at 523.
102. Id. at 531.
103. Id. at 537.
104. Id. at 539.
105. 335 U.S. 525 (1949).
erred the state "right-to-work" laws of Nebraska and North Carolina. Those laws provided that employers were to keep workers without regard to whether they were or were not members of a labor union. Employers were forbidden from entering into contracts obligating themselves to exclude persons from employment because they did or did not belong to a union. As in Nebbia, the law was challenged as being a due process violation in that it improperly interfered with the right of a private individual to contract.

In Ferguson v. Skrupa, the Supreme Court faced a challenge to a statute regulating who may own and operate a business engaged in the practice of "debt adjusting." The State of Kansas had made it unlawful for anyone to operate such an enterprise except as an incident to "the lawful practice of law." The federal district court enjoined enforcement of the statute after Skrupa argued that the business of debt adjusting was a "useful and desirable" one, and that his business activities were not "inherently immoral or dangerous" or in any way contrary to the public welfare. The presence of those elements, Skrupa said, was necessary prior to his business being "absolutely prohibited."

Most recently, in North Dakota State Board of Pharmacy v. Snyder's Drug Store, the Supreme Court considered a North Dakota statute which required an applicant for a permit to operate a pharmacy to be either a registered pharmacist or a corporation the majority stock in which was owned by registered pharmacists. Snyder's Drug Stores Inc. was denied a permit since it was a wholly-

106. Id. at 527.
107. Id. at 527-28.
108. Id. at 533. The Court noted that appellants argued that two "liberties" were denied: "(1) to refuse to hire or retain any person in employment because he is or is not a union member and (2) to make a contract or agreement to engage in such employment discrimination against union or non-union members." Id.
110. Id. at 726-27. "Debt adjusting," the Court said, is defined by statute as "the making of a contract, express or implied, with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business who shall for a consideration distribute the same among certain specified creditors in accordance with a plan agreed upon." Id. at 727.
111. Id. at 727.
112. Id. Skrupa concluded that a business which meets all of these conditions could not be "absolutely prohibited" by statute.
113. Id.
115. Id. at 157-58. These pharmacists must also be "actively and regularly employed in and responsible for the management, supervision and operation of such pharmacy." Id. at 158.
owned subsidiary of Red Owl Stores Inc., a corporation not meeting the statutory ownership requirements. The plaintiff argued that the decision in *Louis K. Liggett Co. v. Baldridge*\(^{116}\) controlled the situation. In *Liggett* the Supreme Court held that it was "clear" that "mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business."\(^{117}\)

In each of these three cases, however, the Supreme Court upheld the right of the state to enact the business regulation challenged. State legislatures, the Court said in *Lincoln Union*, were not to be "put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."\(^{118}\) The court held that "states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."\(^{119}\) What constitutes an "injurious practice" is beyond the scope of judicial review. The Court pointed out in *Skrupa*, "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."\(^{120}\) Thus, for example, the pharmacy regulation in *Snyder Drug Stores* was judicially acceptable since the state legislature could properly have concluded that persons selling "drugs and poisons" were in need of "knowledge in a high degree," a problem which the ownership requirement addressed.\(^{121}\)

Under the principles articulated in these Supreme Court pronouncements, Nebraska's corporate farm ban would likely pass constitutional muster. The prohibition is aimed at perceived "injurious practices in [that state's] internal commercial and business affairs."\(^{122}\) Furthermore, the ban is not "demonstrably irrelevant" to the legislative policy sought to be effected.\(^{123}\) There is a concern over the consequences of possible vertical integration in the agricul-


\(^{117}\) *Id.* at 113.

\(^{118}\) *Lincoln*, 335 U.S. at 536-37.

\(^{119}\) *Id.* at 536.

\(^{120}\) *Skrupa*, 372 U.S. at 730.


\(^{122}\) *Lincoln*, 335 U.S. at 536.

\(^{123}\) *Nebbia*, 291 U.S. at 539.
ture industry. There is a quantifiable adverse impact which non-family corporate farms have on the economic and social well-being of small rural towns. There is a substantial concern both regarding the ability of the new farmer to enter the industry and regarding the ability of the established family farmer to remain economically competitive. In light of these problems, the State of Nebraska may fashion responsive economic regulation with little interference from the federal courts on due process grounds.

Arguments predicated on an equal protection challenge to corporate farm restrictions have fared no better than due process claims. The Supreme Court expressly rejected an equal protection challenge in Asbury Hospital. In Asbury the hospital corporation alleged that the equal protection guarantees of the Fourteenth Amendment were violated by the statutory exceptions (1) for lands owned and held by corporations whose business is dealing in farm-lands; and (2) for lands belonging to cooperative corporations, seventy-five percent of whose members are farmers residing on farms or depending principally on farming for their livelihood. The Nebraska state constitutional amendment has exceptions which are similarly open to challenge. The stated purpose of the Nebraska prohibition is to prevent non-family corporations from becoming more deeply involved in that state’s "crop and livestock operations." The general tenor of the amendment is to absolutely prohibit corporations from "engag[ing] in farming or ranching." The amendment, however, provides for several broad exceptions to this general prohibition. "Land leases by alfalfa processors for the production of alfalfa" are excluded from the ban, for example, but leases for the production of sweet clover, a closely related agricultural product, are not. The amendment extends to "livestock operations" but excludes, in its entirety, "agricultural land operated . . . for the purpose of raising poultry." Questions may be raised

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124. See supra note 25.
125. See supra text accompanying notes 23 to 31.
126. See supra text accompanying notes 20 to 22.
127. See supra text accompanying notes 32 to 34.
128. Asbury Hospital, 326 U.S. at 214-15.
130. Id. at § 4.
131. Object Clause, Initiative 300, Nebraska, November 2, 1982.
132. NEB. CONST. art. XII, § 8(I).
133. Id. at § 8(1)(G).
134. Id. at § 8(1)(F).
about the rationale for these broad exceptions.

These legislative distinctions do not render Nebraska's corporate farm ban unconstitutional on equal protection grounds. In Asbury Hospital, the U.S. Supreme Court sustained the North Dakota legislation with its various exceptions:

The legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose. The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made.\(^{135}\)

The Court then articulated the test of constitutional review which it would apply in such situations: "Statutory discrimination between classes which are in fact different will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it."\(^{136}\) What the Supreme Court said, in effect, was that it will not "redraw the lines" established by a state legislature in a state's internal economic affairs. All legislation involves decisions regarding what to include and what to exclude.\(^{137}\) With the case of corporate farm legislation, the intent is to preserve the family farm within the "traditional core of agricultural production."\(^{138}\) While decisions as to what constitutes that "core" in Nebraska may be questioned as unwise, it would be difficult for the Supreme Court to find that no "state of facts could be conceived which would support" them.

B. The Commerce Clause Question

The commerce clause\(^ {139}\) poses more substantial questions regarding the constitutional validity of corporate farm restrictions than do the due process or equal protection clauses. The wide def-

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135. Asbury Hospital, 326 U.S. at 214.
136. Id. at 215.
137. The Supreme Court has held:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis", it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. [S]tatutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."


138. See supra text accompanying note 54.
erence given to state legislative decisions for the latter constitutional inquiries gives way to predominating national interests in the former.\footnote{California v. Zook, 336 U.S. 725 (1949).} The commerce clause vests in the federal government the power to regulate "[c]ommerce . . . among the several states."\footnote{U.S. CONST. art. I, § 8.} State corporate farming legislation must be evaluated to determine first, if it affects an enterprise engaged in commerce, and second, if such an effect is excessively burdensome on commerce in contravention of the constitutional framework of regulation. No commerce clause challenges have been brought against corporate farm restrictions.\footnote{One legal commentator states: "This potential problem was not argued in Ashbury. Indeed, Chief Justice Stone enticingly mentions this omission in his opinion. Did he do so to suggest that a serious issue was not canvassed by counsel? Or merely that counsel had wisely omitted a frivolous one?" Morrison, supra note 37, at 980 (footnote omitted).} The dual restrictions in Nebraska's corporate farm regulations—those on operation and those on ownership—\footnote{See supra text accompanying notes 38 to 53.} must be examined individually, for they raise different commerce clause issues.

The operation of farms falls within the purview of the commerce clause of the federal constitution. The U.S. Supreme Court, in United States v. Darby,\footnote{312 U.S. 100 (1941).} seemed to limit the applicability of the clause when it sustained the federal power to regulate "production of goods for commerce."\footnote{Id. at 118 (emphasis added).} After this decision, it appeared that agricultural goods produced for in-state use, or for on-farm consumption were not covered by the commerce clause. The scope of "commerce" in the agricultural areas, however, was so broadened in Wickard v. Filburn\footnote{317 U.S. 111 (1942).} that little question can now exist as to the general applicability of the commerce clause to that industry. In Wickard the Supreme Court considered whether the federal government could set marketing quotas for the production of wheat.\footnote{Id. at 113-15.} Wickard, an Ohio farmer, raised a crop of wheat partially for marketing and partially for on-farm consumption. The amount raised for marketing alone fell below the established quota; however, the quota was exceeded when the crop raised for on-farm consumption was also considered. Wickard argued that the production of wheat for his on-farm consumption was "local in character" with effects on
interstate commerce which "are at most 'indirect.'" Thus, he continued, the commerce power of Congress did not reach such production.

The Supreme Court rejected those arguments citing *Gibbons v. Ogden,* which defined the "federal commerce power with a breadth never yet exceeded." The *Wickard* court articulated a test for what may be regulated consistent with the commerce clause: "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. ..." The farm operations reached by Nebraska's corporate farming restrictions fall within the scope of this regulation, "clearly exert[ing] a substantial economic effect on interstate commerce" even should the products, like those in *Wickard*, not actually be placed in the stream of commerce. Particularly in the areas of hog, wheat, and cattle production, the State of Nebraska has sufficient agricultural production to affect both the availability and price of products nationwide.

The mere ownership of farmland poses a more difficult question of whether such activity is in the nature of being "commerce." The Supreme Court cast some doubt on the issue when, in *United States v. South-Eastern Underwriters Association*, it held that "a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce." Similarly, one legal commentator has noted, "[F]ederal investment legislation, both securities laws and more recent interstate land sales

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148. *Id.* at 119.
149. 22 U.S. (9 Wheat.) 1, 194-95 (1824).
150. 317 U.S. at 120. The *Gibbons* court said: "[c]ommerce, undoubtedly, is traffic, but it is something more, —it is intercourse. ..." 22 U.S. at 189.
151. 317 U.S. at 125.
152. *See supra* text accompanying notes 42 to 48.
154. Nebraska harvested an estimated three million acres of wheat in 1980 with a total production of over 112 million bushels, respectively placing it eighth and seventh in the nation. *Agriculture Statistics*, *supra* note 153, at 5.
155. Nebraska marketed over six million head of cattle in 1980, recognizing a gross income of nearly three billion dollars. These production figures placed the state third in the nation in both categories, behind only Texas and Iowa. *Agriculture Statistics*, *supra* note 153, at 308-09.
156. 322 U.S. 533 (1944).
legislation, has depended on interstate or postal movement of the solicitation documents, not on the nature of the ownership itself." Questions can thus be raised regarding whether holding title to real property, including corporate ownership of farmland, is subject to the same analysis.

The Supreme Court, in *South-Eastern Underwriters Association*, held that characterization of a contract simply as "ownership" or not is not dispositive of whether it is part of "interstate commerce." The "[e]ntire transaction, of which that contract is but a part" should rather be examined to determine "whether there may be a chain of events which becomes interstate commerce." In Nebraska, the prohibited acquisition of farmland by a corporation would be applicable only when it involved the corporation in the production and distribution of farm products. Commercial transactions in the agricultural industry, involving local changes in ownership, have previously been litigated before the U.S. Supreme Court and found to be "commerce." In *Swift & Co. v. United States*, a commerce clause case decided in the early 1900s, the Supreme Court considered congressional authority over allegations of price fixing in local stockyard sales. Local stockyard buying and selling was also the subject of scrutiny by the Supreme Court in *Stafford v. Wallace*. In each case the Supreme Court found a "current of commerce" to exist. The *Stafford* Court held that:

> [the stock] transactions can not be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales, without which the flow of the current would be obstructed. . . .

The Court continued:

> The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity. . . .

158. *Morrison, supra* note 37, at 981 (citations omitted).
159. *South-Eastern Underwriters*, 322 U.S. at 547.
160. Indeed, the hog, wheat and cattle business in Nebraska is a *multi-billion* dollar industry. *See supra* notes 153 to 155.
161. 196 U.S. 375 (1905).
162. *Id.* at 390-93, 395.
163. 258 U.S. 495 (1922).
164. *Id.* at 518-19.
165. *Id.* at 516.
166. *Id.*
In fact, the language of the Nebraska corporate farm ban places it neatly into the Supreme Court's "transactions" and "current of commerce" tests. Nebraska does not proscribe simple corporate ownership of farmland. Rather, the amendment places a ban on corporations "acquir(ing) or otherwise obtain(ing) an interest . . . in any title to real estate used for farming or ranching in this state . . . ." It is the act of acquisition, the business transaction, which is regulated rather than the mere holding of title. The act of transferring ownership to the land on which crops are produced does not change the nature of the current of commerce in agricultural products. The transactions involving the land's ownership may change the private interests in the means of production, but they do not change the fact of production and distribution. Thus, under the reasoning articulated in the Swift and Stafford cases, the transactions cannot be separated from the actual production of the crops and livestock to which that land is devoted and from the interstate commerce which that production necessarily implies. In the words of the Supreme Court in South-Eastern Underwriters Association, the acquisition of farmland, even by a corporate conglomerate, is the first part in "a chain of events which becomes interstate commerce." 

Having thus established that both the ownership and the operation of farmland constitutes "commerce" within the meaning of the federal Constitution, it becomes necessary to determine whether Nebraska's prohibition on non-family corporate farming violates constitutional limits by placing an excessive burden on interstate commerce.

The validity of state regulation affecting interstate commerce depends upon a balancing of the national interests in uniform regulation against distinctive local interests. The presence of a local interest is clear. Traditionally, states are allowed to define and create property rights within their respective territories. States, also, have almost exclusive rights to create corporations and to define their limits. With corporations, states have exercised these rights in diverse ways, with some banning corporate ownership of land for particular purposes and others banning corporate ownership except

167. Neb. Const. art. XII, § 8(1).
168. South Eastern Underwriters, 322 U.S. at 546-47.
170. See supra text accompanying notes 79 to 83.
171. See supra text accompanying note 78.
for particular purposes.\textsuperscript{172} Not even this right to define property and corporation law, however, allows a state to evade constitutional limits.

States may, consistent with constitutional commerce clause limits, adopt economic regulations "to effectuate a legitimate local public interest."\textsuperscript{173} The U.S. Supreme Court, in \textit{Pike v. Bruce Church, Inc.},\textsuperscript{174} held that "[i]f a legitimate local purpose is found, then the question becomes one of degree."\textsuperscript{175} The Court continued by stating that four factors would be considered in the balancing process: the nature of the local interest; the extent of the local benefits; the extent of the burden on interstate commerce; and whether the local interests could be protected with a lesser burden on interstate activities.\textsuperscript{176}

The Supreme Court's inquiry into a state corporate farm prohibition would thus seek to balance the local support for family farming against broader national interests. To sustain the validity of Nebraska's amendment, the Supreme Court would need to find that family farm preservation is a "legitimate local purpose" and that an absolute ban on corporate farmland acquisition will not place a "clearly excessive burden" on interstate commerce.\textsuperscript{177} The purposes of the ban unquestionably are "legitimate" for purposes of commerce clause analysis. While the Nebraska law does not expressly articulate its underlying policy objectives, the corporate farm bans in Iowa\textsuperscript{178} and South Dakota\textsuperscript{179} do. The prevention of monopolization,\textsuperscript{180} the preservation of a social structure,\textsuperscript{181} and the promotion of industry efficiency,\textsuperscript{182} all go well beyond the self-serving local economic protectionism which the Supreme Court has struck as not

\textsuperscript{172} See supra text accompanying notes 79 and 80.
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 142.
\textsuperscript{176} Id.
\textsuperscript{178} \textsc{Iowa Code} § 172C.2 (1983).
\textsuperscript{179} "The Legislature of the state of South Dakota recognizes the importance of the family farm to the economic and moral stability of the state, and the Legislature recognizes that the existence of the family farm is threatened by conglomerates in farming." \textsc{S.D. Codified Laws Ann.} § 47-9A-1 (1981 Supp.).
\textsuperscript{180} See supra text accompanying notes 25, 178-79.
\textsuperscript{181} See supra text accompanying notes 23 to 31.
\textsuperscript{182} See supra text accompanying notes 178-79.
being a legitimate purpose. Similarly, the constitutional balancing would most likely weigh in favor of Nebraska’s state regulation. One legal commentator noted:

[T]he actual burden on commerce [of corporate farm prohibitions] remains hypothetical. Unlike . . . other cases, in which specific dollar costs could be associated with state regulations, here a corporation can only express the hope that it could operate a farm on a more economic basis than another purchaser, or might offer a higher price for the land. Hypothetical arguments seem to fall short of the “clearly excessive burden” test which would result in constitutional infirmities. When balanced against the perceived local need for the farm legislation and the historical right of the state to control its own property and corporation laws, a commerce clause challenge to state corporate farm prohibitions would probably fail.

CONCLUSION

Two new trends in the commercial structure of midwestern farming have become apparent in recent years. One involves the transformation of family farm units into family farm corporations while the other involves the subsumation of the family farm by large nonfarm conglomerate corporations. Generally, the trend towards family farm corporations is viewed as being beneficial for the preservation of the family farm as a viable social and economic unit. Placing the family farm into the corporate form yields benefits in the areas of limited individual liability, reduction of tax burdens, and the facilitation of estate planning. The involvement of large conglomerate corporations in farming, however, raises significant concerns. Inflated land prices, the transfer of population and income to metropolitan areas, unfair market competition and a general decline in the quality of rural life are all impacts thought to accrue from such involvement.

As a result of these concerns over conglomerate corporate farming, several midwestern states, including Nebraska, have enacted corporate farm prohibitions. These regulations curtail the right of non-family corporations to own and operate agricultural

184. Morrison, supra note 37, at 986.
185. See supra text accompanying notes 20 to 34.
lands. Questions exist, however, as to the constitutional legitimacy of this state regulation of corporate farming. Challenges could be brought under the due process, equal protection and commerce clauses of the federal constitution. None, however, can withstand close scrutiny.

The U.S. Supreme Court has refused to invalidate state economic regulations on the basis of substantive due process. The Court now holds that states have the right to enact economic legislation if any rational basis can be conceived to justify it. The substantial concerns raised regarding conglomerate corporate farming would provide such a basis.

Neither is there a classification which is constitutionally infirm. Minimum Court scrutiny again is provided with a conceivable rational basis being the touchstone of constitutional review.

Finally, no commerce clause violation arises from Nebraska’s corporate farm prohibition. Nebraska has legitimate local interests which it may wish to advance by its farming regulation. The pursuit of those interests is done in the historical light of allowing states to define their own corporation and property law. These considerations must be balanced against an inquiry into whether the statute places a clearly excessive burden on interstate commerce. The burdens which are advanced in opposition to corporate farming legislation, however, are largely hypothetical and fail to meet the clearly excessive test.

Nebraska has adopted a state constitutional solution to a perceived corporate threat to its social and economic rural institutions. No federal constitutional barriers exist to obstruct it.